STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK MANNING and LINDA MANNING, Plaintiffs-Appellants, v CITY OF EAST TAWAS, Defendant-Appellee, and BLINDA A. BAKER, Defendant.	UNPUBLISHED March 1, 2005 No. 250759 Iosco Circuit Court LC No. 95-009300-NZ

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Plaintiffs Frederick and Linda Manning appeal as of right from an order granting defendant City of East Tawas' motion for summary disposition pursuant to MCR 2.116(C)(10) after remand from this Court.[1] We affirm.

I. Facts and Procedural History

The facts prior to this appeal were described in the previous unpublished opinion as follows:

> This action stems from plaintiffs' proposal to build a recreational vehicle [(RV)] park within the City under the planned unit development (PUD) article of the City's zoning ordinance. The City's planning commission recommended to the city council that plaintiffs' PUD application and site plan be approved, with

[1] A panel of this Court remanded to the circuit court in *Manning v East Tawas*, unpublished per curiam opinion of the Court of Appeals, issued January 22, 1999 (Docket No. 202143).

> conditions. The city council denied the request. On August 29, 1994, plaintiffs attempted to bring the matter before the City's Zoning Board of Appeals, but the request for hearing was denied for procedural reasons. Plaintiffs then filed the instant action in the circuit court against the City and its clerk, Blinda Baker, alleging a deprivation of due process and requesting equitable relief, damages, and a writ of mandamus. Defendants filed a joint motion for summary disposition under MCR 2.116(C)(4), on the ground that plaintiffs could not invoke the circuit court's jurisdiction in its appellate capacity because they did not timely file an appeal to the circuit court from the city council's decision. The trial court denied the motion based on representations by plaintiffs' attorney that plaintiffs were raising only constitutional issues.
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> Plaintiffs then filed an amended complaint with three constitutional due process counts and a count pursuant to the Michigan antitrust reform act (MARA), MCL 445.771 *et seq.*, ... The amended complaint neither named Baker as a defendant nor sought a writ of mandamus. The City moved for summary disposition of the three constitutional counts under MCR 2.116(C)(10), while plaintiffs sought judgment in their favor under MCR 2.116(I)(2). The trial court determined that there were disputed issues of material fact and thus denied the motions. The City then moved for summary disposition under MCR 2.116(C)(4), asserting the claims were not ripe for judicial consideration, and the trial court granted the motion for all three counts.[2]

In the previous appeal, the panel affirmed the trial court's conclusion that review of plaintiffs' "as applied" substantive due process claim was premature, as the denial of plaintiffs' PUD application was not a final decision.[3] The panel reversed the trial court's ruling that plaintiffs' procedural due process and facial substantive due process claims were not ripe for judicial review.[4] However, the panel found that the trial court should have dismissed plaintiffs' procedural due process claim pursuant to MCR 2.116(C)(10).[5] After determining that plaintiffs' pursuit of a mandamus claim was precluded and upholding the trial court's dismissal of plaintiffs' MARA claim,[6] the panel remanded solely because neither party had established grounds to be granted summary disposition on plaintiffs' facial substantive due process claim:

> The validity of an ordinance does not depend on a formal master plan. *Sabo v Monroe Twp*, 394 Mich 531, 538-539; 232 NW2d 584 (1975). However, we uphold the trial court's denial of the City's motion for summary disposition because we find no merit in the "nonconforming use" theory presented by the

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[2] *Id.* at 1-2.

[3] Id. at 3-5.

[4] *Id.* at 5-6.

[5] *Id*. at 8.

[6] *Id.* at 6-7.

> City to establish that recreational vehicle parks are not totally excluded. "A zoning ordinance or zoning decision shall not have the effect of totally prohibiting . . . a land use within a township in the presence of a demonstrated need for that land use . . . unless there is no location within the township where the use may be appropriately located, or the use is unlawful." MCL 125.297a . . . . Tolerating a nonconforming use, even if that use is undertaken by the City itself, does not cure defectively exclusionary zoning provisions. See *Eveline Twp v H & D Trucking Co*, 181 Mich App 25, 33-34; 448 NW2d 727 (1989).
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> We further hold that plaintiffs have not established that the trial court should have granted summary disposition in their favor on the merits of the facial due process count under MCR 2.116(I)(2). Plaintiffs' briefing of this issue on appeal includes no citations to authority in support of their position. This Court is thus relieved of having to entertain the argument. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).[7]

On remand, the trial court dismissed plaintiffs' facial substantive due process claim pursuant to MCR 2.116(C)(10). Based upon stipulated facts submitted by the parties,[8] the court concluded that defendant's zoning ordinance allows RV parks in highway service commercial (HSC) districts and, therefore, the use is not totally excluded. Therefore, the ordinance, on its face, did not violate plaintiffs' right to due process.[9]

II. Summary Disposition

This Court reviews a trial court's determination regarding a motion for summary disposition de novo.[10] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.[11] "In reviewing a motion for summary disposition brought under MCR

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[7] *Id.* at 8.

[8] During oral argument in the previous appeal, the parties "essentially conceded that [an RV] park is not a transient lodging facility." *Id.* at 9 n 2. On remand, however, the parties stipulated that an RV park is a transient lodging facility and is a principal permitted use in an HSC district.

[9] As the trial court concluded that an RV park is a principal permitted use in an HSC district, plaintiffs challenged the trial court's dismissal of its earlier "as applied" substantive due process claim. Plaintiffs argued that they were no longer able to seek a variance from the ordinance to make the "as applied" claim ripe for judicial consideration, as the trial court had concluded that an RV park is a principal permitted use. See *id.* at 4-5. See also *Frericks v Highland Twp*, 228 Mich App 575, 582; 579 NW2d 441 (1998), citing *Paragon Properties Co v Novi*, 452 Mich 568, 575; 550 NW2d 772 (1996). The trial court declined to consider plaintiffs' contention as it was not properly before it on remand, and we agree. Plaintiffs waived their challenge to the ordinance as applied by stipulating to facts that are inapposite to the findings made by this Court in the previous appeal. Plaintiffs destroyed their claims by stipulating to these facts, and, now, there is no remedy that we can provide.

[10] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

[11] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d
(continued…)

2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[12] Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[13]

III. Substantive Due Process, Facial Challenge

We review a trial court's ruling on the facial validity of a zoning ordinance de novo, giving "considerable weight to the findings of the trial court."[14] Zoning ordinances are presumed valid and the plaintiff has "the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property."[15] "A facial challenge alleges that the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of *all* property regulated in the market."[16] Therefore, the claimant must show that the ordinance totally excludes the proposed use[17] and that the ordinance precludes any use on the particular parcel "to which it is reasonably adapted."[18] However, a zoning ordinance is valid, even if exclusionary, when it serves a "'rational relation to the public health, safety, welfare and prosperity of the community.'"[19]

As noted above, the parties stipulated that defendant's zoning ordinance did not totally exclude RV parks from the City. RV parks are a principal permitted use in HSC districts. Furthermore, plaintiffs have never claimed that an RV park was the only use to which the property was suited. Accordingly, plaintiffs have failed to establish a question of fact that defendant's zoning ordinance is facially invalid, and the trial court properly granted defendant's motion to dismiss.

Affirmed.

/s/ Janet T. Neff
/s/ Jessica R. Cooper

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685 (1999).

[12] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[13] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

[14] *Frericks, supra* at 599.

[15] *Id.* at 594, quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992).

[16] *Paragon Properties, supra* at 576 (emphasis added).

[17] *Kropf v Sterling Hgts*, 391 Mich 139, 155-156; 215 NW2d 179 (1974).

[18] *Id.* at 162-163.

[19] *Frericks, supra* at 607-608, quoting *Christine Building Co v Troy*, 367 Mich 508, 516; 116 NW2d 816 (1962).